

1
2
3
4
5
6
7
8

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

HOSIE KENNETH FRAZIER,

Case No.: 3:19-cv-00088-MMD-WGC

Plaintiff,

**Report & Recommendation of
United States Magistrate Judge**

v.

BARBARA DAVIS,
TREMAIN DAVIS,

Defendants.

Re: ECF Nos. 1, 1-1

This Report and Recommendation is made to the Honorable Miranda M. Du, United States

District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C.

§ 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and *pro se* complaint (ECF No. 1-1).

I. IFP APPLICATION

A person may be granted permission to proceed IFP if the person “submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

The Local Rules of Practice for the District of Nevada provide: “Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The

1 application must be made on the form provided by the court and must include a financial affidavit
2 disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

3 "[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some
4 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
5 (quotation marks and citation omitted). A litigant need not "be absolutely destitute to enjoy the
6 benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

7 A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee;
8 therefore, the application should be granted.

9 **II. SCREENING**

10 **A. Standard**

11 "[T]he court shall dismiss the case at any time if the court determines that-- (A) the
12 allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails
13 to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant
14 who is immune from such relief." 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

15 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
16 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) tracks
17 that language. As such, when reviewing the adequacy of a complaint under this statute, the court
18 applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d
19 1108, 1112 (9th Cir. 2012) ("The standard for determining whether a plaintiff has failed to state a
20 claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule
21 of Civil Procedure 12(b)(6) standard for failure to state a claim."). Review under Rule 12(b)(6) is
22 essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723
23 (9th Cir. 2000) (citation omitted).

1 The court must accept as true the allegations, construe the pleadings in the light most
2 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395
3 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less stringent
4 standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9 (1980)
5 (internal quotation marks and citation omitted).

6 A complaint must contain more than a "formulaic recitation of the elements of a cause of
7 action," it must contain factual allegations sufficient to "raise a right to relief above the speculative
8 level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading must contain
9 something more ... than ... a statement of facts that merely creates a suspicion [of] a legally
10 cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a plaintiff
11 should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570; *see*
12 *also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

13 A dismissal should not be without leave to amend unless it is clear from the face of the
14 complaint that the action is frivolous and could not be amended to state a federal claim, or the
15 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
16 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

17 **B. Plaintiff's Complaint**

18 Plaintiff's complaint is brought under 42 U.S.C. § 1983 and names Barbara Davis and
19 Tremain Davis. Plaintiff's complaint, similar to a prior complaint he has filed (3:19-cv-00050-
20 MMD-WGC) contains a stream-of-consciousness type narrative where he asserts that the
21 defendants run a ring of prostitutes under their authority of James Wells and their mother, Paula
22 Davis (who was sued in the prior action). He claims that they extort women and are fake cattle
23 farmers. He claims that they stole his money and killed his father, also Hosie Frazier, and his legal

1 parent, Ernest Frazier and put his money in various American and Swiss bank accounts all over
2 the world. He claims they are under investigation by the NSA and CIA. He alludes to himself being
3 under cover for one of those agencies.

4 The court cannot discern any plausible claim for relief in Plaintiff's complaint. As the
5 Supreme Court has noted, "a litigant whose filing fees and court costs are assumed by the public,
6 unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or
7 repetitive lawsuits." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). "To prevent such abusive or
8 captious litigation, § 1915(d) [now § 1915(e)(2)(B)(i)] authorizes federal courts to dismiss a claim
9 filed [IFP] 'if the allegation of poverty is untrue, or if satisfied that the action is frivolous or
10 malicious.'" *Id.* "Dismissals on these grounds are often made *sua sponte* prior to the issuance of
11 process, so as to spare prospective defendants the inconvenience and expense of answering such
12 complaints." *Id.* (citation omitted). A complaint is frivolous "where it lacks an arguable basis either
13 in law or in fact." *Id.* This term "embraces not only the inarguable legal conclusion, but also the
14 fanciful factual allegation." *Id.* Section 1915(e)(2)(B)(i) "accords judges not only the authority to
15 dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to
16 pierce the veil of the complaint's factual allegations and dismiss those claims whose factual
17 contentions are clearly baseless." *Id.* at 327. This includes "claims of infringement of a legal
18 interest which clearly does not exist" and "claims describing fantastic or delusional scenarios." *Id.*
19 at 327-28.

20 Here, the court cannot discern an arguable basis in fact or law for Plaintiff's allegations.
21 Therefore, this action should be dismissed with prejudice as frivolous.

22 ///
23 ///

III. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an order:

(1) **GRANTING** Plaintiff's IFP application (ECF No. 1). Plaintiff is permitted to maintain this action without prepaying the filing fee or giving security therefor. This order granting IFP status does not extend to the issuance of subpoenas at government expense.

(2) The complaint (ECF No. 1-1) should be **FILED**.

(3) The action should be **DISMISSED WITH PREJUDICE** as frivolous.

The Plaintiff should be aware of the following:

9 1. That [s]he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
10 this Report and Recommendation within fourteen days of being served with a copy of the Report
11 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s Report
12 and Recommendation” and should be accompanied by points and authorities for consideration by
13 the district judge.

14 2. That this Report and Recommendation is not an appealable order and that any notice of
15 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
16 until entry of judgment by the district court.

DATED: July 2, 2019.

Walter G. Cobb

William G. Cobb
United States Magistrate Judge